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July 9, 1997

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142

Dear Mr. Caton:

Telefónica Internacional de España, S.A. ("Telefónica Internacional"), by its attorneys, hereby submits for filing an original and nine copies of its Comments in connection with the above-captioned matter.

Also enclosed is an additional copy of Telefónica Internacional's Comments which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Alfred M. Mamlet
Colleen A. Sechrest
Counsel for Telefónica Internacional
de España, S.A.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **Rules and Policies on Foreign Participation in the U.S. Telecommunications Market**	**IB Docket No. 97-142**

COMMENTS OF TELEFÓNICA INTERNACIONAL DE ESPAÑA, S.A.

Dated: July 9, 1997

Telefónica Internacional de España, S.A.

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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF TELEFÓNICA INTERNACIONAL DE ESPAÑA, S.A.

I. INTRODUCTION AND SUMMARY

Telefónica Internacional de España, S.A. ("Telefónica Internacional") supports the Commission's proposal to replace its current effective competitive opportunities ("ECO") standard with a policy of open entry for Section 214, Title III common carrier, and cable landing license applications submitted by affiliates of carriers from WTO countries.[1/] As the NPRM correctly recognizes, the successful conclusion of the WTO Agreement on Basic Telecommunications Services ("WTO Telecom Agreement") not only obligates the Commission to eliminate its current entry

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1/ In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Order and Notice of Proposed Rulemaking, IB Docket No. 97-142 (rel. June 4, 1997) ("NPRM").

restrictions, but eliminates the need for them.[2/] The WTO Telecom Agreement will increase competition in 69 countries, which account for 95 per cent of the international traffic of WTO Member countries.

The Commission's proposals are also extremely important because the rest of the world is closely watching the U.S. implementation of its WTO commitments. Telefónica Internacional looks forward to the elimination of all foreign carrier entry barriers in the U.S., Spain and elsewhere. If the U.S. maintains or establishes barriers to foreign carrier entry, then other countries around the world will be much less likely to abolish their remaining barriers to entry by foreign carriers.

While the Commission is correctly abandoning the ECO test, Telefónica Internacional is concerned that several of the NPRM's proposals could significantly restrict foreign carrier access to the U.S. market by creating new entry barriers or retaining old ones. **First**, and foremost, the NPRM's suggestion that a foreign-affiliated carrier's entry be conditioned on the carrier's foreign affiliate's compliance with the Commission's proposed mandatory settlement rate benchmarks[3/] should not be adopted for four reasons: (1) this condition would create a significant new entry barrier to the U.S. market for carriers from all but 9 of the 131 (93%) WTO countries; (2) this entry barrier is not necessary to protect competition in the U.S. market; (3) the market forces unleashed by the WTO Telecom Agreement and this NPRM will themselves place significant downward pressure on settlement rates; and (4) this entry barrier would be inconsistent with the United States' obligations under GATS.

Second, the Commission should also eliminate the entry barrier of Commission review of circuit additions for all carriers. This barrier is not needed to protect competition in the U.S. market. Moreover, retention of this entry barrier would

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[2/] NPRM ¶¶ 1-3.

[3/] NPRM ¶ 119; In the Matter of International Settlement Rates, Notice of Proposed Rulemaking, IB Docket No. 96-261 (rel. Dec. 19, 1996) ("Benchmarks Notice").

violate the U.S. market access and MFN commitments under the WTO Telecom Agreement.

Third, the Commission should not be sidetracked by suggestions that it delay a foreign-affiliated carrier's entry to the U.S. market pending FCC review of the affiliated country's WTO compliance record. Such a delay would immerse the Commission into detailed inquiries which would serve as an administrative barrier to entry. Moreover, such inquiries are unnecessary, as the WTO has established dispute resolution procedures to address compliance issues. Finally, the United States is obligated to comply with its own WTO commitments whether or not other Members do so themselves.

II. THE COMMISSION SHOULD ADOPT AN UNQUALIFIED OPEN ENTRY STANDARD FOR ALL CARRIERS AFFILIATED WITH CARRIERS FROM WTO COUNTRIES

The Commission should adopt an unqualified open entry standard with respect to all basic telecommunications services for all carriers affiliated with carriers from WTO countries. Such a standard is compelled both by the United States' commitments under the new WTO Telecom Agreement and by the new competitive global environment that Agreement creates. Telefónica Internacional therefore supports the NPRM's proposals to replace its ECO standard for Section 214, Title III common carrier and cable landing license applications with an open entry standard.[4/]

The Commission should be careful not to negate its efforts to open markets in the U.S. and abroad by adopting new entry barriers or retaining old ones. Certainly, the Commission should not create a new barrier to entry to the U.S. market by conditioning a foreign carrier's entry on compliance with the Commission's proposed

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[4/] NPRM ¶¶ 32, 62 & 68.

mandatory benchmarks.[5/] Similarly, the Commission should eliminate the entry barrier of requiring Commission approval to add circuits. Finally, the Commission's licensing process should not include a review of whether a foreign carrier's home country is complying with its WTO commitments.

A. Telefónica Internacional Supports the NPRM's Proposal to Replace its ECO Test with an Open Entry Test for all Foreign Carriers from WTO Countries

Telefónica Internacional supports the NPRM's proposal to replace its ECO test with an open entry standard for WTO foreign carriers' Section 214, Title III common carrier and cable landing license applications.[6/] As the NPRM itself recognizes, the WTO Basic Telecom Agreement both compels this decision as both a matter of changed market conditions and treaty obligation:

> ***The WTO Basic Telecom Agreement promises to alter fundamentally the competitive landscape for telecommunications services.*** Not only have 69 countries agreed to permit competition from foreign suppliers of basic telecommunications services, but 65 of these countries have committed to enforce fair rules of competition for basic telecommunications services . . . ***As a result, most of the world's major trading nations [including the United States] made binding commitments to transition rapidly from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services.***[7/]

In other words, the WTO Telecom Agreement has created a highly competitive global market which "substantially achieve[s] the paramount goal of our *Foreign Carrier Entry Order*, promoting effective competition in the U.S. international services market."[8/] It

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[5/] NPRM ¶¶ 38 & 119.

[6/] NPRM ¶¶ 32, 62 & 68.

[7/] NPRM ¶ 2 (emphasis supplied).

[8/] NPRM ¶ 29.

accomplishes this by legally binding Members to open their markets to foreign competition. As a result, the NPRM recognizes, "the public interest will be served by dispensing with [the] detailed review of competitive conditions in foreign markets" that the ECO test entails.[9/]

The NPRM translates this recognition into a proposal to adopt an open entry standard, permitting entry except where there is a demonstration of a very high risk of anticompetitive consequences in the United States telecommunications market.[10/] Indeed, in order to comply with its GATS obligations, the United States must provide open entry to all carriers from WTO countries.[11/]

Equally important, the other WTO countries are watching this proceeding to see if the U.S. fulfills its WTO Telecom Agreement commitments by removing all its remaining barriers to foreign carrier entry on an unqualified basis. Telefónica Internacional looks forward to the day when there is no barrier to foreign carrier entry in the United States, Spain or the rest of the world. That day will come much sooner if the U.S. provides the important example of removing all barriers to entry on an unqualified basis. On the other hand, if the U.S. does not remove existing barriers, or if the U.S.

9/ NPRM ¶ 5.

10/ NPRM ¶¶ 32 (Title II), 62 (Title III) & 68 (cable landing license). In addition, Telefónica Internacional believes that, under Section 402(b)(2)(A) of the Telecommunications Act of 1996, the Commission has jurisdiction only over a carrier's initial Title II entry into the U.S. market, not over subsequent additions of lines or capacity to the carrier's existing network. Specifically, Section 402(b)(2)(A) states: "[t]he Commission shall permit **any** common carrier to be exempt from the requirements of Section 214 of the Communications Act of 1934 for the extension of **any** line . . ." (emphasis supplied). Thus, the Commission must allow all carriers, whether U.S. or foreign, to extend their lines and increase capacity without the need for prior Commission approval. See Comments and Reply Comments of Telefónica Larga Distancia de Puerto Rico filed in CC Docket No. 97-11.

11/ The U.S. market access commitments precludes the Commission from denying entry to a carrier with an affiliation in a WTO country on the basis of competitive conditions in that country. GATS, art. II(1); U.S. Schedule of Commitments, 2.C.a.

erects new barriers to entry, then other countries will be more likely to maintain existing barriers to entry and to add new ones.

B. The Commission Should Not Erect a New Barrier to Entry by Conditioning Access to the U.S. Market on Settlement Rates Within the Proposed Benchmarks

The Commission should not erect a new barrier to entry by conditioning a foreign carrier's entry on its home country's compliance with the Commission's mandatory settlement rate benchmarks for four reasons: (1) this condition would create a significant barrier to entry to the U.S. market for most carriers from WTO countries; (2) this condition is not necessary to protect competition in the U.S. market; (3) the markets forces unleashed by the WTO Telecom Agreement and this NPRM will themselves place significant downward pressure on settlement rates; and (4) this condition would be inconsistent with the United States' obligations under GATS.

1. The Commission's Proposal Would Create a Significant Barrier to Entry

The NPRM's proposal to condition entry on compliance with mandatory benchmarks would create a significant barrier to entry. The condition would swallow the proposed open entry rule, creating a settlement rate entry standard. This settlement rate standard can only be met by affiliates of foreign carriers in 9 WTO countries. Carriers in the remaining 122 WTO countries would not be able to meet this standard.[12/] Thus, this condition would create a new entry barrier to carriers from more than 93% of WTO countries. Moreover, while the Commission has proposed transition periods of one to five years for carriers to meet the benchmarks after adoption in the *Benchmark*

12/ Compare FCC Consolidated Accounting Rates of the United States (July 1, 1997) with Benchmarks Notice at Appendix B.

Rulemaking,[13] this proposed settlement rate entry standard would go into effect by the end of 1997 -- less than six months away.

In short, a benchmark condition would create an entry standard that is as difficult to meet as the Commission's current ECO test. It would thus serve as a considerable barrier to entry for almost all foreign affiliated carriers.

2. Conditioning Entry on Compliance with Settlement Rate Benchmarks Is Not Necessary to Protect Competition in the U.S. Telecommunications Market

The NPRM implies that mandatory benchmarks are necessary to prevent anti-competitive conduct in the United States telecommunications market: "Finally, we believe that the rules we have proposed in the *Benchmarks* proceeding would largely eliminate the ability and incentive of foreign carriers to engage in anti-competitive conduct."[14] However, the NPRM offers no evidence or justification to support an assertion that compliance with the proposed settlement rate benchmarks is necessary to protect competition in the U.S. market. In fact, settlement rates above the benchmark range do not provide a foreign affiliated carrier with a competitive advantage in the U.S. market. In particular, above-cost settlement rates do not provide foreign carriers with the incentive or ability to subsidize their U.S. affiliates or to "price squeeze" their unaffiliated competitors.

Above-cost rates do not provide anti-competitive subsidies for foreign-affiliated carriers. As the Commission itself has already recognized, the argument that above-cost settlement rates serve as an incentive to a foreign carrier to subsidize its U.S. affiliate:

> appears to ignore the opportunity costs to the foreign parent of offering service through an affiliate in competition with

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[13] Benchmarks Notice ¶ 63.

[14] NPRM ¶ 38 (citing Benchmarks Notice ¶ 35).

> U.S. carriers that formerly purchased termination service from the parent. In serving its home market directly through its affiliate, the foreign parent would no longer receive the settlement payment it formerly received from U.S. carriers to terminate traffic in that market.[15/]

A simple example showing the change in settlement revenues to a foreign carrier entering the U.S. market on a route to an affiliated country readily establishes that the Commission's statement is correct. Indeed, entering the U.S. market **reduces** the corporate-wide settlement revenues on the route between the U.S. and the affiliated country. Accordingly, above-cost settlement rates do not provide foreign carriers with any additional funds with which to subsidize their U.S. affiliates.

In Table 1A, traffic volume on the U.S.-Country X route is 100 minutes; on the return Country X-U.S. route, 50 minutes; and the settlement rate is $1.00 per minute.

TABLE 1A

BEFORE FOREIGN CARRIER ENTERS MARKET ON AFFILIATED ROUTE			
Carrier	**Country X-U.S. Route**	**U.S.-Country X Route**	**Net Settlements Revenues (Payments)**
Carrier X	$ -50.00	$ 100.00	$ 50.00
AT&T	$ 50.00	$ -100.00	$ -50.00

In Table 1A, Carrier X receives net settlement revenues of $50 because the traffic imbalance is 50 minutes.

Table 1B modifies the example to illustrate the entry of Affiliate X, 100% owned by Carrier X, on the U.S.-Country X market. It is assumed that Affiliate X is able to capture 20% of the market on the U.S.-Country X route, entitling it to 20% of the return traffic on the Country X-U.S. route. The last row of Table 1B establishes the

15/ Benchmarks Notice ¶ 80.

corporate-wide position Corporate X based on the combined activity of Carrier X and Affiliate X.

Table 1B

AFTER FOREIGN CARRIER ENTERS MARKET ON AFFILIATED ROUTE			
Carrier	**Country X-U.S. Route**	**U.S.-Country X Route**	**Net Settlements Revenues (Payments)**
Carrier X	$ -50.00	$ 100.00	$ 50.00
AT&T	$ 40.00	$ - 80.00	$ -40.00
Affiliate X	$ 10.00	$ - 20.00	$ -10.00
Corporate X	$ 40.00	$ 80.00	$ 40.00

A comparison of Tables 1A and B demonstrates that the combined settlement revenues of Corporate X's Carrier X and its U.S. Affiliate X are actually **lower** ($40.00) than if Affiliate X had not entered the U.S. market ($50.00). Clearly, the foreign carrier is not acquiring extra funds with which to subsidize it U.S. affiliate. Indeed, in order to maximize profits from above-cost settlement rates, the foreign carrier should not enter the U.S. market.

Moreover, even if it were profitable for a foreign carrier to subsidize its affiliate, it would not need above-cost settlement fees to do it, but could use its profits from unrelated activities or borrow the funds necessary to do so. It would not, however, be profitable to cross-subsidize a U.S. affiliate to permit it to charge prices below incremental cost. As GTE explained in the *Benchmarks* proceeding: "[a] foreign carrier has no incentive to squander its profits by cross-subsidizing a U.S. affiliate because it will never be able to recover, in the form of later monopoly profits, more than the losses suffered."[16/] Indeed, there is no reasonable basis for asserting that a foreign affiliated

16/ Comments of GTE filed in IB Docket No. 96-261 at 25 (citing Brooke Group Ltd. (continued ...)

carrier will ever be to acquire a monopoly position on the U.S. end of any international route.[17/]

Additionally, high settlement rates do not allow foreign carriers to "price squeeze" their unaffiliated competitors. To effect such a price squeeze, a carrier must control the input prices of its competitors. It would then raise those prices while lowering its service prices on the route in question. However, as the Commission itself has recognized, foreign carriers do not control the input prices of its competitors:

> We are not convinced that dominant foreign carriers can set the "input" accounting rate level unilaterally. These rates are established by negotiation between a U.S. and foreign carrier. Competitive pressures from end users and carriers, as well as our International Settlements Policy, have strengthened the position of U.S. carriers during accounting rate negotiations, and we expect this trend will continue.[18/]

Moreover, even if a foreign carrier could control the input accounting rates, it is unlikely that the foreign carrier could "maintain low prices and high accounting rates over a sufficiently long time period so as to inflict substantial economic harm to competitors."[19/] In short, it is completely unrealistic to expect that a foreign-affiliated carrier would have the ability to use price squeezes to drive AT&T and other U.S. competitors out of a particular market. Even if such predatory price squeezes were possible, a foreign-affiliated carrier could not profit from them by subsequently raising prices because its competitors could then reenter the market.

16/ (... continued)

v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2588 (1993) (citing Masushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986))).

17/ See Comments of Telefónica Internacional at 70 and Reply Comments of Telefónica Internacional at 44-50, filed in IB Docket No. 96-261 for a complete discussion of the relationship between settlement rates and anti-competitive behavior.

18/ Foreign Carrier Entry Order, 11 FCC Rcd. at 3898.

19/ Id.

3. Market Forces Unleashed by the WTO Telecom Agreement and the NPRM Will Reduce Settlement Rates Without Additional Regulation

Market forces, liberated by an open entry standard in the U.S. and implementation of the WTO Telecom Agreement abroad, will force significant reductions in settlement rates without further regulatory intervention. Market forces have already reduced settlement rates more than 10% in 1995, another 10% in 1996 and yet an additional 10% in the first four months of 1997.[20/]

The powerful market forces reducing settlement rates will be strengthened by implementation of the WTO Telecom Agreement, and by the NPRM's proposals to permit carriers from WTO countries to provide switched services over interconnected private lines ("ISR"), and to enter into flexible accounting rate arrangements.[21/] These proposed **deregulatory** actions will increase market pressures on foreign carriers to reduce settlement rates to avoid losing significant amounts of correspondent traffic.

The Commission itself has long recognized this relationship between market forces and lower accounting rates. Indeed, it was this recognition that prompted the Commission to refuse to condition entry of foreign-affiliated carriers on cost-based accounting rates as part of its ECO standard in the first place:

> Thus, increased global competition will encourage foreign carriers to move accounting rates towards cost-based levels. We therefore believe it would be ***counterproductive*** to require cost-based accounting rates as a precondition to foreign carrier market entry.[22/]

This statement underscores the unfortunate irony in the NPRM's proposal: while the NPRM recognizes that the competitive forces unleashed by WTO Telecom Agreement

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[20/] FCC Accounting Rates For International Message Telephone Service Of the United States, 6 (May 1, 1997).

[21/] NPRM ¶¶ 50 & 150.

[22/] Foreign Carrier Entry Order, 11 FCC Rcd. at 3899 (1995) (emphasis added).

permit the elimination of the Commission's ECO test, it nevertheless seeks to replace that standard with a settlement rate standard -- an entry criterion that the Commission declined to make part of its ECO test to begin with.

4. Conditioning Entry on Mandatory Benchmarks Is Inconsistent with U.S. GATS Obligations

Not only are mandatory benchmarks unnecessary, but they are also inconsistent with the United States' commitments under GATS. As the NPRM itself acknowledges, " [t]he GATS also requires that any regulatory safeguards that we impose on carriers from WTO Member countries are consistent with our obligations under the WTO Basic Telecom Agreement, including our MFN and National Treatment Obligations."[23/] The mandatory benchmarks are not consistent with these obligations, nor with the equally important U.S. obligation of market access.[24/] Significantly, neither the GATS itself nor the WTO Telecom Agreement Reference Paper contain any exceptions which authorize the Commission to take such inconsistent action.

The proposed benchmarks condition is inconsistent with the United States' obligations under GATS in two respects. **First**, it violates the principle of MFN by discriminating between carriers from different WTO countries. It does this by: (1) imposing conditions on market access for IMTS providers on particular routes, and (2) requiring settlement payments that vary arbitrarily from the Commission's own estimates of individual country costs for terminating international calls on their domestic networks.

Second, the proposed benchmarks condition violates the GATS principle of market access. As discussed above, the proposed condition would block access to

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[23/] NPRM ¶ 79.

[24/] See Reply Comments of Telefónica Internacional filed in IB Docket 96-261 at 10-21 for a full analysis of the GATS problems raised by the Commission's mandatory benchmarks proposal. These Reply Comments are hereby incorporated by reference.

the U.S. market for carriers from more than 93% of WTO countries. Such a result simply cannot be viewed as consistent with the market opening purpose of the GATS Agreement, or the U.S. commitments.

Neither the GATS Agreement itself, nor the WTO Telecom Agreement Reference Paper contain any exceptions which permit the Commission to violate the United States' MFN and market access commitments.[25/] The GATS contains a number of affirmative obligations designed to ensure that Members do not, except in specified circumstances, adopt regulations that impair fundamental GATS obligations. For example, article V(e) of the GATS Annex on Telecommunications directs Members to ensure that no condition is imposed on access to and use of the public telecommunications network and service other than as necessary to: (1) safeguard the public service responsibilities of network and service suppliers; (2) protect the technical integrity of public telecommunications transport networks or services; or (3) ensure that service suppliers of any other Member do not supply services not permitted under the scheduled commitments. Conditioning market entry on compliance with mandatory benchmarks serves none of these limited purposes.

Additionally, Article VI:4 of the GATS expressly requires Members to ensure that their licensing standards are "not in themselves a restriction on the supply of the service."[26/] Mandatory benchmarks which most countries of the world cannot meet are nothing but a restriction on the supply of service. As such, they cannot possibly be construed as GATS-consistent.

[25/] The GATS agreement provides for only limited exceptions to its fundamental obligations of MFN, national treatment and market access. These exceptions relate to emergency safeguards (article X), balance of payments safeguards (article XII), government procurement (article XIII), security exceptions (articles XIV bis), and certain general exceptions (article XIV). None of these exceptions can be interpreted to permit the Commission to impose mandatory benchmarks as a condition to entry.

[26/] GATS, art. VI:4.

The WTO Basic Telecom Agreement Reference Paper expressly provides that: "Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."[27/] This provision allows the United States to impose regulations to prevent major suppliers in the **U.S. market** from engaging in anti-competitive practices. Clearly, no foreign-affiliated carrier is a major supplier in the United States. This provision does not authorize the U.S. to regulate major suppliers in foreign markets.[28/]

Moreover, this Reference Paper provision represents an additional commitment pursuant to article XVIII of the GATS and does not supersede any other GATS obligations. To hold otherwise would be to permit GATS members to undermine the fundamental market-opening purpose of GATS by erecting regulatory trade barriers in the guise of anti-competitive safeguards. The NPRM's proposal to condition entry on compliance with mandatory benchmarks would be just such a disguised trade barrier. Indeed, the Commission itself has explicitly stated that such benchmarks are "in effect, a barrier to market entry."[29/]

C. The Requirement for Commission Approval of Circuit Additions Is an Entry Barrier which the Commission Should Eliminate

The Commission should eliminate entirely its current policy of requiring Commission approval for the addition of new circuits. Such a requirement constitutes a barrier to entry because it puts affected carriers at a significant disadvantage in the U.S. market. While the Commission correctly eliminates this barrier for "dominant"

27/ Reference Paper, ¶ 1.1.

28/ In addition, as demonstrated in Part II. B., this entry barrier is not needed to prevent anti-competitive harm to the U.S. market.

29/ Foreign Carrier Entry Order, 11 FCC Rcd. at 3898.

carriers,[30] it proposes to retain it for carriers that would be subject to a new category of "supplemental dominant" regulation.[31] Because this requirement constitutes a significant barrier to entry it should be eliminated like the other barriers to entry in order to increase competition, fulfill the U.S. WTO Telecom Agreement obligations, and lead the world in eliminating all barriers to entry.

Moreover, retention of this entry barrier is not needed to protect competition in the U.S. market. The Commission's International Settlements Policy prevents a foreign affiliated carrier from exploiting additional circuits to receive more than a proportionate share of return traffic.[32] The Commission's requirement that dominant carriers report to the Commission traffic and revenues on a quarterly basis will allow it to detect any violation of this rule.[33]

In addition, retention of this entry barrier would be inconsistent with U.S. WTO Telecom Agreement market access commitment by limiting foreign carriers' access to the U.S. market.[34] This barrier would also violate U.S. obligations by imposing differential regulation on foreign carriers according to the level of competition in their home countries. The nature and extent of such competition is directly tied to the specific commitments made by the country in question under the WTO Telecom Agreement. As discussed below, the nature and extent of such commitments are not

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30/ NPRM ¶ 35.

31/ NPRM ¶ 107.

32/ Any alternative accounting rate arrangement would remain subject to Commission review. NPRM ¶¶ 150-151.

33/ NPRM ¶ 98.

34/ This is in contrast to the NPRM's proposed "basic" regulations, which consist primarily of record-keeping and reporting requirements. Such regulations would not adversely affect a carrier's ability to compete in the U.S. market.

permissible bases for determining entry or regulating foreign carriers under GATS. To use them as such is a direct violation of the GATS MFN principle.

D. The Commission Should Not Use the Licensing Process to Examine Other WTO Members' Compliance Records

The NPRM queries whether the Commission should examine a WTO Member's compliance record when reviewing a particular application.[35/] The Commission should not incorporate such a review into the licensing process both because it would create an administrative trade barrier akin to the ECO test, and because it too would run afoul of U.S. GATS commitments.

First, a Commission review of another country's GATS compliance record would create an administrative trade barrier similar to the ECO standard that the NPRM proposes to abandon. In particular, in order to assess Members' compliance with their commitments, the Commission would have to undertake "fact-specific, detailed reviews of competitive conditions on particular bilateral international telecommunications routes" -- precisely the type of review that the ECO standard currently entails.[36/] Such a review would likely be both time consuming and expensive and would thus delay entry significantly. It would also add considerable uncertainty into the licensing process in terms of both timing and ultimate outcome.

Second, it is a basic principle of GATS that, just as a WTO Member cannot examine another Member's commitments in implementing its own, it may not take unilateral action to suspend its commitments based on its unilateral determination that another WTO Member has failed to implement its own commitments.[37/] A WTO

35/ NPRM ¶ 47.

36/ NPRM ¶ 34.

37/ See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, article 23.

Member that believes its rights under GATS are impaired may seek redress only through the GATS dispute resolution process.[38/] Thus, even if the FCC (rather than a GATS dispute resolution panel) determines that a country has not complied with its GATS commitments, it cannot deny entry to that country's foreign carriers as a retaliatory measure. Rather, it must continue to afford entry to all foreign carriers from WTO countries on a nondiscriminatory basis in accord with the United States' schedule of commitments.

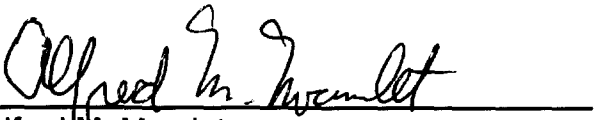
III. CONCLUSION

For the foregoing reasons, Telefónica Internacional urges the Commission to adopt the NPRM's proposals to replace its ECO test with a policy of unqualified open entry for carriers from WTO countries, without conditioning entry on compliance with mandatory benchmarks.

Dated: July 9, 1997

Respectfully submitted,

Telefónica Internacional de España, S.A.



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38/ Id.

CERTIFICATE OF SERVICE

I, Colleen Sechrest, do hereby certify that a copy of the foregoing **Comments Of Telefónica Internacional de España, S.A.** has been sent, via first class mail, postage prepaid (or as otherwise indicated), on this 9th day of July, 1997 to the following:

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